No. 94-141

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RANDALL A. TERRY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENT

Robert Abrams, then-Attorney General of the State of New York, and his assistant, Sanford Cohen, acted as lead and exclusive counsel for the State of New York, as plaintiff in a civil suit against Petitioner, and for the United States, as prosecutor in a consequent criminal contempt proceeding against Petitioner. Petitioner objected, relying upon the holding of this Court in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order," *id.* at 809 (footnote omitted). The district court overruled petitioner's objection and subsequently convicted Petitioner of criminal contempt. The Second Circuit affirmed.

Petitioner renews his *Young*[1] argument before this Court. The United States, as Respondent, opposes the petition for certiorari with a straightforward—but erroneous—legal proposition, namely, that *Young* does not apply to state attorneys general. Because this contention—like the decision below—cannot be reconciled either with *Young* or with the relevant decisions of other federal courts of appeals, this Court should grant the present petition for certiorari.

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT IN *YOUNG v. UNITED STATES EX REL. VUITTON ET FILS, S.A.*

In *Young,* this Court held, in the exercise of its supervisory power, that it is error to "appont[] as prosecutors [of contempt charges] counsel for an interested party in the underlying civil litigation." 481 U.S. at 802. This Court premised its holding in *Young* upon several different considerations, all ultimately stemming from the fact that dual representation inherently jeopardizes the neutrality of the appointed prosecutor.

A. This Court pointed to the "concern that representation of other clients may compromise the prosecutor's pursuit of the [U.S.] Government's interest," *id.* at 804; in particular, this Court warned of the possible subordination of the "Government's interest . . . in dispassionate assessment of the propriety of criminal charges" for the sake of the civil litigant's "interest . . . in obtaining the benefits of the court's order," *id.* at 805.

This concern applies with full force in the present case. The New York Attorney General (NYAG) and the United States took directly opposing positions both on the meritoriousness of plaintiff's principal and sole federal cause of action and on the propriety of prosecuting Peti-

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[1] The Respondent refers to the *Young* case as the *Vuitton* case. The label is immaterial.

tioner for criminal contempt. NYAG Abrams brought suit under 42 U.S.C. § 1985(3) and appeared as amicus in support of a similar claim in this Court. *See* Brief of the Attorneys General of New York and the Commonwealth of Virginia as Amici Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985). The United States, by contrast, appeared as amicus in opposition to the § 1985(3) claim before this Court. *See* Brief for United States as Amicus Curiae Supporting Petitioners, *Bray* (No. 90-985). (This Court subsequently vindicated the position of the United States in its decision in *Bray*.) The NYAG prosecuted Petitioner for criminal contempt. The U.S. Attorney, by contrast, declined to prosecute this contempt action because of the position taken by the United States in *Bray*. Pet. at 4-5. One could hardly imagine more explicitly contrary legal positions or more graphically conflicting interests.

More importantly, this Court focused in *Young* upon "the *potential* for private interest to influence the discharge of public duty," 481 U.S. at 805 (emphasis in original), "[r]egardless of whether . . . any prosecutorial impropriety" actually resulted, *id.* The United States concedes in the present case the "[t]he State of New York and the United States are different sovereigns, and cases will inevitably arise in which their interests diverge." Opp. at 11-12. This is precisely why the Second Circuit erred by creating an exception to *Young* for state government attorneys. "Given this *inherent conflict in roles*, there is no need to speculate whether the [appointed] prosecutor will be subject to extraneous influence." 481 U.S. at 807 (emphasis added; footnote omitted).

B. In *Young*, this Court also identified other considerations supporting its holding that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order," *id.* at 809 (footnote omitted). Among these additional considerations were the ethical

concern of placing an attorney in a situation rife with potential conflicts of interest, *id.* at 803-04 & n.14, the potential for abuse of discovery for the sake of its cross-use in parallel proceedings, *id.* at 806-07, and the sheer "appearance of impropriety" in "the appointment of counsel for an interested party to bring the contempt prosecution," *id.* at 806 (emphasis in original).

These additional concerns apply with equal force to the present case.

As already noted—and as the United States concedes—state attorneys general will "inevitably" encounter conflicts between their obligation to represent the state and their obligation to represent the United States. The present case presents a classic illustration of such a conflict, given the exactly opposite positions these sovereigns took both as to plaintiff's federal claim and as to the propriety of bringing the present criminal contempt prosecution. Hence, the NYAG faced (and disregarded) serious ethical binds arising from these conflicts of interest. "In a case where a prosecutor represents an interested party, the ethics of the legal profession *require* that an interest other than the [U.S.] Government's be taken into account." *Id.* at 807 (emphasis in original).

Potential abuse of discovery inheres in the use of identical counsel for plaintiff and prosecutor in parallel criminal and civil proceedings. The fact that plaintiff's counsel is a state attorney general in no way mitigates this concern, as the same discovery methods are available. Again, in the case at bar, this concern became a reality as the NYAG used civil discovery materials to secure Petitioner's criminal conviction. Pet. at 7.[2]

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[2] The United States argues that the NYAG could have obtained the same information through criminal discovery. Opp. at 13. But the possession of civil discovery in hand would both motivate and guide the criminal discovery. Discovery is obviously much easier and more attractive when one already knows what one will find and where to look for it.

The appearance of impropriety is likewise not diminished by the fact that the plaintiff's attorney is a state government official. Indeed, the scandal to the public may be *greater* where the attorney wearing "two hats" is supposed to be an unbiased public servant. Thus, even aside from NYAG Abrams's undisputed use of the present prosecution for political reasons, Pet. at 6; Pet. App. 45a-46a, even aside from Abrams's outspoken abortion advocacy while litigating against a prominent pro-life activist, Pet. at 6; Pet. App. 34a, and even aside from Abrams's personal expression of animosity toward petitioner, Pet. at 6; Pet. App. 34a-36a (chanting "You are going to lose" and razzing Petitioner), the dual representation itself created an appearance of impropriety.

C. At bottom, the argument of the United States is that *Young* should not apply because "[a]n attorney general is the representative of a sovereign and acts on behalf of the public interest." Opp. at 11. This argument ignores the fact that the State of New York is a *different* sovereign from the United States. It is precisely this divergence of interests—which the United States concedes, Opp. at 11-12—that triggers the logic and the rule of *Young*.

There are doubtless some who are prepared to abandon the concept of federalism and declare the states to be mere puppets of the federal government with no independent or contrary interests. But that view betrays both the letter and spirit of the U.S. Constitution. The New York Attorney General, as representative of a distinct party with distinct interests, cannot accept appointment to prosecute a federal criminal contempt charge on behalf of the United States without running afoul of *Young*. Because the Second Circuit decision upheld this appointment, in conflict with *Young*, this Court should grant review.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The United States argues that there is no conflict between the decision below and the decisions of other circuits. This claim is specious.

A. The United States points out that "no other court of appeals has addressed the application of [*Young*] to attorneys who represent a State." Opp. at 8. Assuming this to be true, there are still two important defects in this argument.

First, the decision below, refusing to apply *Young*, conflicts with the many other circuits correctly applying *Young*, *see* Pet. § II, unless the distinction between private party plaintiffs and state plaintiffs is of sufficient importance to negate the applicability of *Young*. In other words, the argument of the United States begs the merits of the question presented: the United States claims that the decision below does not conflict with other circuits because the decision below correctly distinguished *Young*, a contention refuted above. *Supra* § I.

Second, while Petitioner knows of no federal appellate decision addressing the particular application of *Young* to state attorneys general,[3] there *are* other circuits applying *Young* to *federal* government attorneys. Federal government lawyers obviously have a much stronger argument for escaping the *Young* rule: unlike state attorneys general, federal government attorneys represent the very same sovereign in both the civil suit and the criminal contempt proceedings. Nevertheless, the Fifth and Ninth Circuits have held that *Young* does limit the ability of courts to appoint even federal agency attorneys as prosecutors for related criminal contempt actions. *See* Pet. at 12-13. *A fortiori*, if the appointment in this case flunks

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[3] Presumably in other cases the courts and litigants knew about and correctly followed *Young* by avoiding such improper prosecutorial appointments.

the test for *federal* government attorneys, Pet. at 14-15, the appointment also flunks the no less stringent test for *state* government attorneys.

The decision below is therefore logically irreconcilable with the decisions of the Fifth and Ninth Circuits applying *Young* (albeit in somewhat modified form) to federal government attorneys.

B. The United States attempts to distinguish away the conflicting decisions of the Fifth and Ninth Circuits, quoting selected portions of the opinions. Opp. at 15-17. But these efforts ignore the plain language and holdings of these decisions.

As set forth in the Petition for Writ of Certiorari, both the Fifth and Ninth Circuits have ruled that where (as here) the appointed prosecutor was deeply involved in the underlying civil litigation and where (as here) the U.S. Attorney does not retain control of the contempt prosecution, the appointment is improper. Pet. at 14-15. *See United States ex rel. Securities & Exch. Comm'n v. Carter*, 907 F.2d 484, 487-88 (5th Cir. 1990); *Federal Trade Comm'n v. American Nat'l Cellular*, 868 F.2d 315, 320 (9th Cir. 1989). In the present case, the NYAG and his assistant acted as lead and exclusive counsel in both the civil suit and the criminal contempt prosecution. The U.S. Attorney deliberately had no involvement in, much less control over, the criminal contempt. Hence, the decision below would not pass muster with either the Fifth or Ninth Circuits.

CONCLUSION

"In *Young*, we instructed courts to request the United States Attorney to prosecute the criminal contempt charge, and, if the United States Attorney declined, to appoint as a special prosecutor *a private attorney other than the attorney for an interested party*." *United States v. Providence Journal Co.*, 485 U.S. 693, 696 n.3 (1988) (emphasis added). The district court failed to follow that instruction in the present case. The Second Circuit sustained that failure, thereby rendering a decision in conflict with this Court's decision in *Young* and with the decisions of other circuits. This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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